**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
| **Implementation of the Local Competition Provisions in the Telecommunications Act of 1996** | ) | **CC Docket No. 96-98** |
| **Intercarrier Compensation for ISP-Bound Traffic** | ) | **CC Docket No. 99-68** |

**REPLY COMMENTS OF THE**
**ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel, and pursuant to Section 1.429(g) of the Commission's Rules,[1] hereby replies to comments on multiple petitions for reconsideration and/or clarification of the *Order on Remand and Report and Order*, FCC 01-131, released in the captioned proceedings on April 27, 2001 (*"Remand Order"*). For many of the same reasons set forth in ASCENT's comments, virtually all commenters support the *Remand Order*'s "mirroring rule" which "ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic."[2] Because any deviation from that position would undermine the Commission's goals in this proceeding, ASCENT repeats its support for the "mirroring rule" here. ASCENT also urges the Commission to reject the position of Verizon, alone in its opposition to Wireless World's request that the Commission remedy the *Remand Order's* frustration of the legitimate business expectations of carriers which had

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1 47 C.F.R. § 1.429(g).

2 Remand Order, FCC 01-131, ¶ 89.

expended significant efforts and resources on interconnection negotiations on or before the date on which the *Remand Order* was released. ASCENT supports Wireless World's request and asks that the Commission expand the scope of carriers entitled to the "transition during which to make adjustments to their prior business plans"[3] to include such carriers.

In their opposition to the "mirroring rule", the National Telephone Cooperative Association ("NTCA"), the Independent Alliance on Inter-Carrier Compensation ("IAIC") and a coalition of small incumbent LECs ("Choctaw, *et al."*) (collectively, the "ILEC Petitioners") complained that the *Remand Order* had denied them lawful notice of the potential expansion of rate caps applicable to ISP-bound traffic subject to Section 251(b)(5). That contention has been soundly refuted not only by ASCENT, but numerous other commenters as well. AT&T Wireless Services, Inc. ("AT&T Wireless Services") for example, notes that "[e]ven when final rules differ from proposed rules, an agency is not required to re-notice if the changes 'flow logically from' or 'reasonably develop' the rules originally proposed."[4] And, as AT&T Wireless Services continues, "the mirroring rule is as much a logical outgrowth of the proposals set forth in the *Public Notice* and the *1999 Reciprocal Compensation NPRM* as are the ISP rate caps adopted in the *Order*."[5]

Voicestream Wireless Corporation ("Voicestream") observes that "the rural LECs had constructive notice of the final rule", the record in this docket being "replete with discussions concerning various network architectures, calling patterns, costs, and cost structures – with respect

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3 Remand Order, FCC 01-131, ¶ 81.

4 Comments of AT&T Wireless Services, Inc. ("AT&T Wireless Services"), p. 4.

5 Id. (internal footnotes omitted.)

to both ISP traffic and Section 251(b)(5) traffic."[6] Indeed, noting that "the Commission sought broad comment on 'the scope of the reciprocal compensation requirement of section 251(b)(5)' and on any 'new or innovative inter-carrier compensation arrangements for ISP traffic," Voicestream characterizes "[t]he specificity that Choctaw demands in a rulemaking" as "absurd".[7]

The Cellular Telecommunications & Internet Association ("CTIA") also counters the ILEC Petitioners' "unreasonably narrow view of the issues intricately involved in this proceeding,"[8] stating that

> "[f]ar from being unimaginable, an analysis of ISP-bound traffic, its nature and the appropriate compensation arrangements therefore, unaccompanied by a discussion of its relationship to the nature of and compensation arrangements for non-ISP-bound traffic would be novel. Because the two types of traffic are inter-related, they are not properly considered in a vacuum. The rules adopted in the Report and Order account for this inter-relationship with a new approach, but the connection between the two types of traffic is not – or should not have been – foreign to Petitioners. . . . The discussion by other interested parties of compensation arrangements for non-ISP-bound traffic strongly suggests that the Public Notice is reasonably deemed to have provided notice that such an issue would arise."[9]

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6 Comments of Voicestream Wireless Corporation ("Voicestream"), p. 8.

7 Id., p. 9.

8 Comments of the Cellular Telecommunications & Internet Association ("CTIA"), p. 5.

9 Id., p. 6.

As ASCENT noted in its comments, the lack of merit in the ILEC Petitioners' procedural challenge to the *Remand Order* is confirmed by the flexibility built into the new compensation arrangement by the Commission. Numerous other commenters also stress that incumbent LECs are not obliged to exchange traffic subject to Section 251(b)(5) at the reduced compensation rates identified in the *Remand Order* for ISP-bound traffic; rather, the *status quo* is preserved for those incumbent LECs that elect not to apply these rate caps to non-ISP-bound traffic. As AT&T Wireless notes, it is not the case that "the mirroring rule was unlawfully thrust upon them; ILECs have the choice of whether or not to adopt the ISP rates offered by the Commission and therefore, ILECs control whether or not the mirroring rule is applicable to their Section 251(b)(5) traffic."[10] Voicestream also highlights the absence of cognizable harm to the ILEC Petitioners, observing that "any ILEC that determines that it is not in its economic interest to cap its rates for Section 251(b)(5) traffic simply need not select that option. . . . The only thing that has changed is that the Mirroring Rule prevents rural LECs from reducing their revenue outflows for ISP traffic without taking the reciprocal step of limiting the rates they charge for their Section 251(b)(5) traffic."[11]

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[10] Comments of AT&T Wireless, pp. 2-3.

[11] Comments of Voicestream, pp. 11, 12.

In one of the more charitable characterizations of the ILEC Petitioners' position, the Association for Local Telecommunications Services ("ALTS") observes that "the Rural ILEC Petitioners fundamentally misinterpret the Commission's *Order*. They assert that ILECs are required to terminate Section 251(b)(5) traffic at the federal rates for ISP-bound traffic. However, the *Order* merely requires such a result if the ILECs choose to adopt the federal rates for ISP-bound traffic."[12] Voicestream, on the other hand, believes that "the Petitions represent a transparent effort by the rural LECs to ensure that they retain the ability to charge CMRS carriers indefensibly high non-cost-based rates for reciprocal compensation while also adopting ISP traffic rate caps."[13] The "'have our cake and it it too' approach of certain rural LECs", according to Voicestream, indicates an intentional attempt to skew the competitive process, not merely a vacuous "misunderstanding" of the *Remand Order*'s holdings.

Whether the position advocated by the ILEC Petitioners results from misunderstanding or intent is ultimately irrelevant. As the Commission has stated, "[b]ecause we are concerned about the superior bargaining power of incumbent LECs, we will not allow them to 'pick and choose' intercarrier compensation regimes, depending on the nature of the traffic exchanged with another carrier."[14] The Commission has also made unmistakably clear its position that it would be "patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffice at state reciprocal compensation rates, which are much higher than the

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12 Comments of the Association for Local Telecommunications Services ("ALTS"), pp. 6-7.

13 Comments of Voicestream, p. 3.

14 Remand Order, FCC 01-131, ¶ 89.

caps we adopt here, when the traffic imbalance is reversed."[15]

[15] Remand Order, FCC 01-131, ¶ 89.

Against this backdrop, ASCENT agrees with the assessment of the Competitive Telecommunications Association ("CompTel") that "the 'mirroring' rule is an essential part of the Commission's regulatory regime for ISP-bound traffic; without that rule the Commission could not achieve the objectives which it identifies as the justification for the *Remand Order*."[16] Indeed, without the "mirroring rule", the Commission could not prevent its "regulations governing ISP-bound traffic from undermining local competition."[17] The Commission must not allow this result. Rather, as AT&T Wireless urges, the Commission should stand firm, ensuring that "if ILECs want to take advantage of the interim benefit the Commission has granted them with regard to ISP rates, then ILECs must accept the reasonable conditions the Commission has imposed on the exercise of that benefit."[18] In the alternative, "ILECs who find the mirroring requirement unacceptable may forego the immediacy of the interim arrangement and pursue a more 'acceptable' compensation arrangement through the permanent, albeit relatively delayed, rules that will arise out of the more comprehensive *Inter-Carrier Compensation* rulemaking."[19]

Through its Petition, Wireless World has asked the Commission to include among those competitive providers that will be compensated for terminating ISP-bound traffic at the capped rates adopted in the *Remand Order* carriers that had requested interconnection negotiations on or before the date on which the *Remand Order* was released. In abbreviated comments, the Verizon telephone companies ("Verizon") oppose Wireless World's request, asserting as the basis for that

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16 Comments of the Competitive Telecommunications Association ("CompTel"), p. 2.

17 Id., p.3.

18 Comments of AT&T Wireless, p. 3.

19 Comments of CTIA, p. 10.

position that Wireless World is not entitled to relief since only "[a] carrier that was actually exchanging traffic under an approved interconnection agreement arguably had some right to rely on the assumption that the arrangement would continue for the life of that agreement."[20] Saying little else, Verizon chooses to ignore Wireless World's main concern, namely, that the *Remand Order* gives insufficient consideration to the fact that carriers must commit significant resources (of both time and money) to the interconnection process long before those efforts result in the actual

[20] Comments of the Verizon companies ("Verizon"), p. 2.

exchange of traffic pursuant to an effective interconnection agreement. By placing its bright line at this point, the Commission has shortchanged such carriers.

As the Commission is aware, reciprocal compensation arrangements are of significant concern to carriers; such rates are ultimately determined in many instances only after lengthy negotiation. At every stage of the discussions the requesting carrier must recalculate, re-evaluate, perhaps revise its business plan significantly, in order to structure a viable offering which can be sustained based upon the evolving interconnection arrangement. Wireless World asks that the Commission reconsider and resolve the essentially "flash-cut" effect of the *Remand Order's* "new market bar" on carriers which have already committed significant resources to the interconnection negotiation process – carriers which just like those carriers actually exchanging traffic under an approved interconnection agreement have factored into their respective business plans the likely reciprocal compensation. Wireless World requires such relief because, as borne out by the comments, the Commission's assumption that "carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues"[21] is "factually incorrect."[22]

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[21] Remand Order, FCC 01-131, ¶ 81.

[22] Opposition of Core Communications, Inc., KMC Telecom, Inc., and e.spire Communications, Inc. ("Joint Commenters"), pp. 4-5.

Core Communications, Inc., KMC Telecom, Inc., and e.spire Communications, Inc. (collectively, the "Joint Commenters") describe in detail the lengthy lead times and the extensive physical and regulatory activities, all of which "involve material financial expenditures and must be completed prior to even submitting an interconnection request to an ILEC."[23] The Joint Commenters further point out that "in a publicly-filed response to a recent interrogatory, Verizon demonstrated that it takes nine to 15 months from a CLEC's request date for Verizon to provide interconnection that permits 'traffic exchange.'"[24] Fully aware of this nine to 15 month delay, during which carriers will be predicating business plans based, at least in part, on reciprocal compensation payments, Verizon nonetheless asserts that "it is clear that the Commission drew this line in a reasonable place."[25] ASCENT disagrees.

As described by the Commission, the interim compensation mechanism adopted in the *Remand Order* was designed to account for "the legitimate business expectation of carriers," avoiding "a market-disruptive 'flash cut' to a pure bill and keep regime."[26] In light of the above, it is inherently inequitable for the Commission to subject certain carriers to a specific business-disruptive flash cut "merely because they did not begin providing service to customers in those markets before the effective date of the order."[27] Rather, a reasonable place to draw the line would be precisely where Wireless World asks the Commission to draw it – at the point where a carrier has

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23 Id., p. 5.

24 Id.

25 Comments of Verizon, p. 2.

26 Remand Order, ¶ 77.

27 Comments of ALTS, p. 2.

undertaken the numerous activities which must be completed prior to submitting an interconnection request to an ILEC and has actually submitted that interconnection request prior to the adoption of

the *Remand Order*.[28] Verizon's opposition notwithstanding, the Commission should redraw the line to protect the legitimate business expectations of carriers which have requested interconnection arrangements prior to the adoption of the *Remand Order*.

Consistent with the foregoing, the Association of Communications Enterprises urges the Commission to refrain from modifying the "mirror rule"pursuant to which incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic and to grant the relief requested by Wireless World in order to avoid a disruptive flash cut to a bill-and-keep regime where carriers have expended the resources necessary to request interconnection arrangements prior to the adoption of the Remand Order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

[28] Sprint Corporation ("Sprint"), recognizes both that significant commitment of carrier resources occurs long before the submission of an interconnection request and that the growth caps set forth in the *Remand Order* will competitively disadvantage new entrant carriers. Thus, the carrier advocates as "the preferable course of action" the "eliminat[ion of] the growth and new market caps entirely." Comments of Sprint, p. 6. ASCENT does not disagree with Sprint but urges the Commission that if it will not go as far as Sprint would like, it should at a minimum provide the relief sought by Wireless World.

I, Catherine M. Hannan, do hereby certify that a true a correct copy of the foregoing Comments of the Association of Communications Enterprises has been served by the First Class Mail, postage prepaid, on the individuals listed below, on this 3rd day of August, 2001:

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